NO. 2727

In the

United States

Circuit Court of Appeals

For the Ninth Circuit

ALASKA MEXICAN GOLD MINING COMPANY,
a Corporation,

Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT COURT FOR ALASKA, DIVISION NUMBER ONE.

Brief for the Defendant in Error

J. H. COBB,
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STATEMENT OF THE CASE.

This is one of the suits brought for the purpose of testing the validity of the revenue laws of the Territory of Alaska, of which there are four others here pending.

The controversy was submitted as an agreed case under the provisions of Chapter 28 of the Alaska Code of Civil Procedure.

From the agreed case it appears that the Alaska Mexican Gold Mining Company was a corporation, duly incorporated and carrying on a mining business between July 31st 1913 and January 1st, 1914, and during that period had a net income of $59,655.77, and that for the calendar year of 1914 it recovered a net income of $119,953.49, upon which sums the Territory of Alaska demanded and obtained judgment for ½ of 1 per cent as provided in the revenue act of the Territory, known as Chapter 52 of the Session Laws of Alaska 1913. It further appears from the agreed statement that the Alaska Mexican Gold Mining Company fully complied with the provisions of the Act of Congress providing for taxes on business and trade in Alaska by paying thereunder a tax of $3.00 per annum on each of its one hundred and twenty stamps.

The court held that under the statement the defendant was liable for the license tax laid by the Territory of Alaska in Chapter 52 Session Laws of

1913; and that the taxes so due may be recovered in a civil action under the provisions of Chapter 76 Session Laws of 1915, and rendered judgment in favor of the Territory and against the defendant for the proper amount under said rulings. (Record pages 21-22). The defendant thereupon assigned errors (Record pages 25-26) and brought the cases to this court upon Writ of Error. The errors assigned are four (Record pages 25-26), and as we understand it, raise the following questions when taken in conjunction with the Bill of Exceptions, namely:

1st—That no civil liability was created by the provisions of Chapter 52 of the Act of the Territorial Legislature, Session Laws 1913, and that the provisions of Chapter 76 of the Session Laws of the Alaska Legislature of 1915 providing for the collection of the back taxes then due by civil suit, was void because retroactive.

2nd—That Chapter 52 of the Act of the Territorial Legislature of 1913 is void so far as the defendant is concerned because it was impossible for the defendant to comply with the provisions of said act and apply for and obtain a license as therein provided, because it could not know and therefore pay in advance, the ½ of 1 per cent on its net income, and that a court, in a prosecution for failure to comply with it, would be powerless to impose a sentence because the amount fixed as a penalty is so indefinite

and uncertain that no sentence could be imposed by the court.

3rd—That the said Territorial Act is void because it confers arbitrary power upon the court or judge to deny the owner of a mining claim or claims the right to work and operate said claims, and thereby gives it the power to confiscate the property of the defendant engaged in a lawful occupation.

4th—That the license tax imposed by the said Act of the Alaska Legislature is a revenue measure pure and simple and is in conflict with that provision of Section 9 of the Organic Act which reads: "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessment shall be according to the actual value thereof," and that consequently the Alaska Legislature had no power to raise revenue by a license tax.

5th—That the said Act of the Territorial Legislature was void in that it is not uniform upon the same class of subjects, because of the exemption from taxation of the first $5000 of the net income.

ARGUMENT

In as much as this is a test case, in which, if for any reason, assigned or otherwise, the Territorial Revenue Bill attacked is invalid, it is in the interest of public policy that it be so declared, we will proceed to discuss the questions in our own way without seeking to follow too closely and *seriatim* the

points discussed in the brief of the plaintiff in error.

1st—The first question raised is that there was no civil liability created by the revenue act of Alaska 1913, and that the provision for civil suit for all such taxes, found in the Revenue Act, Chapter 76 Session Laws of Alaska 1915, is void because retroactive.

This contention will be seen to be wholly untenable by a mere glance at the law in question. Section 3 of the Act (Session Laws of Alaska 1913, pages 110-111) provides that any person, firm or corporation convicted of a violation of the act shall be fined a sum equal to the license required for the business, trade or occupation, and for a second conviction, a sum double the amount, and then follows this: "Provided further, however, that in the event of any person, firm or corporation shall fail to pay the license required by the provisions of this Act and shall further fail to pay any fine that may be imposed by a court of competent jurisdiction, for such failure to so pay said license fee or taxes required by the provisions of this act, judgment may be entered against such firm, person, or corporation and process shall be issued for the enforcement of the collection of said judgment and in the same manner as judgments in civil proceedings." Whether a civil action would lie under this provision is not material or necessary to consider or determine. A liability for the payment of money was created. By Section 4 of Chapter 76 Session Laws of Alaska 1915, page

189, a civil remedy was given, and that remedy by Section 7, page 190, was made applicable for taxes due under the Act of 1913. That a statute which merely gives a new remedy to enforce an existing right is not retroactive within the meaning of the constitution, is too well settled and too obvious to require either argument or authority to support it.

2nd—If the defendant had attempted to comply with the law and found it impossible to do so, or if he was resisting a sentence to be imposed after a conviction, the objections made under this heading might at least be admissible of some argument. In reply to it, it is only necessary to say that many of the persons and corporations, including among the latter the greatest metal producer in the Territory, have complied with the law and found no difficulty therein. The language of the Act (see Session Laws of Alaska 1915, page 107), is as follows: "That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the Territory of Alaska, shall first apply for and obtain a license so to do from the District Court or a subdivision thereof in said Territory, and pay for said license for the respective lines of business and trades as follows, to-wit: .....mining, ½ of 1 per cent on the net income over and above $5000.00 per annum." When this Act was passed, there was in force and had been in force since 1898, an Act providing for a license tax on business in Alaska (See

Compiled Laws of Alaska, page 782) which reads as follows: "That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for and obtain a license so to do from the District Court or a sub-division thereof in said District, and pay for said license for the respective lines of business and trade as follows, to-wit:" It will thus be seen that the language used in the Act of the Alaska Legislature was copied from the Act of Congress.

Now among the lines of business taxed by the Act of Congress, were the following: Fisheries, Salmon Canneries, 4c per case; Salmon Salteries 10c per barrel; Fish Oil Works 10c per barrel); Fertilizer Works 20c per ton; Mercantile Establishments doing a business of $100,000.00 per annum, $500.00 per annum; doing a business of $75,000.00 per annum, $375.00 per annum; doing a business of $50,000.00 per annum, $250.00 per annum; doing a business of $25,000.00 per annum, $125.00 per annum; doing a business of $10,000.00 per annum, $50.00 per annum; doing a business of under $10,000.00 per annum, $25.00 per annum; doing a business of under $4,000.00 per annum, $10.00 per annum. Now it is manifest that the taxes upon the fisheries and upon the mercantile establishments could only be ascertained and paid at the end of the year for which they were paid, and at the time the Alaska Legislature passed the bill laying the indeterminate tax

upon mines, Alaska had had fourteen years experience under the Tax Act of Congress and there had never been any trouble or difficulty of any kind in ascertaining and collecting the tax upon the salmon canneries, salmon salteries, fish oil works, fertilizers or mercantile establishments. All that was necessary under the Act of Congress, and all that is necessary under the Act of the Alaska Legislature, is to apply a little common sense and reason to it, and it is perfectly easy to see that in the cases in which the amount of tax is made to depend upon the operations of the line of business during the year for which the tax is laid, it shall be calculated and paid at the end of the year, though the Legislature did not expressly so provide.

3rd—It is contended by the defendant that the Territorial Act is void because it confers arbitrary power upon the court or judge to deny the owner of a mining claim the right to work and operate said claim and therefore confers upon them the power to confiscate property. To say the least, this is a rather strange objection to come from a defendant that has refused to apply for a license or to pay its taxes when ascertained. No such difficulty or objection has ever arisen under the Act of Congress, and indeed could not arise. The act of the court in issuing the license is a ministerial act and when the person subject to the payment of the taxes has tendered the same, the court has no function to perform except to issue the license.

4th—It is next contended that the license tax imposed is a revenue measure pure and simple and as such is in conflict with that portion of Section 9 of the Organic Act which provides "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessment shall be according to the actual value thereof." In answer to this argument it is only necessary to point out that the Alaska Legislature possessed legislative power extending to "all rightful subjects of legislation"; and it will hardly be denied that the raising of revenue by levying license taxes on business pursuits is "a rightful subject of legislation." (25 Cyc Page 599). And, as a matter of fact, the provision quoted from Section 9 of the Organic Act has absolutely no application to license taxes, for:

> "The constitution of many of the states contain the requirement that taxation shall be equal and uniform, that all property in the state shall be taxed in proportion to its value, that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, or that the legislature shall provide for an equal and uniform rate of assessment and taxation; and in the face of such provisions a tax law which violates the prescribed rule of equality and uniformity is invalid, although there is sufficient difference in the wording of the different provisions to ac-

count for some lack of uniformity in the decisions as to what constitutes a violation of their requirements. The requirement does not apply to every species of taxation, and does not restrict the legislature to the levying of taxes upon property alone. The restriction relates only to the rate or amount of taxation and its incidence upon taxable persons and property, and does not limit the legislature in regulating the mode of levying and collecting the taxes imposed, and it also relates only to property within the state, and neither the statutes of another state nor the action of its taxing officers can affect the question. In the absence of such a constitutional requirement it is not essential to the validity of taxation that it shall be equal and uniform, and in such a case a tax law cannot be declared unconstitutional merely because it operates unequally, unjustly, or oppressively.

The requirement of equality and uniformity applies only to taxes in the proper sense of the word, levied with the object of raising revenue for general purposes, and not to such as are of an extraordinary and exceptional kind, or to local assessments for improvements levied upon property specially benefitted thereby, or to other burdens, charges, or impositions which are not properly speaking taxes; and further, such a constitutional provision is to be restricted to taxes on property, as distinguished from such as

are levied on occupations, business, or franchises, and in inheritances and successions, and as distinguished also from exactions imposed in the exercise of the police power rather than that of taxation.

The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits, nor prevent the legislature from taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons pursuing the same avocation, or that if those following the same calling are divided into classes for the purpose of taxation, the basis of classification shall be reasonable and founded on a real distinction, and not merely arbitrary or capricious. To this extent also, and no further, the principle applies to license fees or taxes imposed under the police power or for the better regulation of occupations supposed to have an important public aspect."

(37 Cyc. p. 729-33.)

(*See also Binns vs. U. S.*, 194 *U. S.* 436.)

5th—The last point involved directly in the Bill of Exceptions and in the Assignments of Error, is that the Tax Act of 1913 is void because of the exemption from taxation of the first $5000.00 of the net income, and it is said that it is not therefore uniform upon the same class of subjects. Why not?

The Act merely classifies the incomes which shall pay and those which shall not pay, according to a uniform rule. The defendant gets an exemption on its first $5,000.00 of net income exactly the same as the man whose income only equals, or is less than $5000.00. (See 37 Cyc cited above.)

6th—There is another question not directly raised in this case, but which is involved in some of the others and is embodied in the agreed statement, which we deem it proper to briefly notice, though the question is treated more at length in the briefs of some of the other cases, namely: Is the Act of the Alaska Legislature approved April 29th 1915 and printed as Chapter 76 Session Laws of Alaska for that year, void because actually passed in the morning hours of April 30th 1915? If it is, then the question of the right to a money judgment might depend solely upon the provisions found in Chapter 52 of the Session Laws of 1913, already quoted. The facts upon which this contention is made are set forth in the agreed statement as follows:

> "The second session of the legislature which passed chapter 76, Session Laws of Alaska, 1915, convened on the 1st day of March, 1915, at 12 o'clock noon; that on the 29th day of April, 1915, said legislature adjourned, sine die, at 12 o'clock midnight, according to the official time-pieces of said legislature, that it to say, the clocks hanging in the halls of the two houses of the legislature were stopped or turned back by the sergeant-at-

arms just prior to the hour of 12 o'clock midnight of April 29th, 1915, and thereafter between the hours of 3 and 4 o'clock A. M., sun time, of April 30, 1915, while the clocks in said halls of the legislature still indicated prior to midnight, being stopped or turned back as aforesaid, the said act, namely, chapter 76 of the Session Laws of Alaska, 1915, was finally passed by both houses of the legislature and approved by the governor and was enrolled and filed in the office of the Secretary of State for the territory as it now appears in the printed volume of Session Laws of Alaska 1915, Chapter 76; that the Governor of the Territory of Alaska did not call an extra session to pass said act."

To this contention there are two complete answers. First, the sole evidence to which the courts can look to ascertain what is the statutory law is the journals of the legislative body and the enrolled bills found in the office of the Secretary of State. These are conclusive upon the courts.

Fields vs Clark, 143 *U. S.* 649.

Lyons vs Wood, 153 *U. S.* 649.

Harwood vs Wentworth, 162 *U. S.* 547.

Second, As the Legislature for 1915 met at noon on March 1st, the sixty days to which it was limited by the Organic Act did not expire until noon of April 30th, and April 29th as a legislative day of twenty-four hours, actually ended at noon on April 30th.

White vs Hinton, 17 *L. R. A.* 66.

In conclusion we respectfully submit that the legislative power of the Territory of Alaska embraces "all rightful subjects of legislation" not in conflict with the constitution of the United States or the Organic Act itself; that the laying of license taxes is "a rightful subject of legislation," that not only is there nothing in the constitution or in the Organic Act prohibiting the exercise of this power, but that by Section 3 of the Organic Act the power to lay such taxes is expressly recognized and given; for after prohibiting the legislature from altering, amending, modifying or repealing certain laws, including the laws of the United States providing for taxes on business and trade in Alaska, it was "provided, further, that this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

It may be conceded that the revenue bill for 1913 under which the cause of action herein arose, is loosely and inartificially drawn; it may be conceded that there would have been great difficulty in enforcing it had the Territory actively attempted to do so. But there was no machinery of law provided by the Legislature of 1913 to enforce actively the revenue laws. As a consequence no revenue was collected except from those who complied voluntarily with the law. According to the reports of the Treasurer of Alaska 1915, there was paid in under the revenue laws of 1913, $54,641.03. In 1915 at the second session of the Legislature the Governor was

authorized to appoint a chief counsel for the Territory of Alaska (see Senate Joint Resolution Number 6 approved April 29th 1915, Session Laws of Alaska 1915, page 197) and the Legislature made an appropriation to cover the expenses of the work, (See Session Laws of Alaska 1915 page 129); and by the provisions of Chapter 76 Session Laws of 1915, Sections 3, 4 and 7, it was made the duty of the legal counsel for the Territory to enforce the collection of both the current revenue and the back taxes that had accrued under the Act of 1913, and definite remedies and procedure were therein laid down.

We respectfully submit that none of the objections made to the validity of the laws under the taxes involved in this suit are sought to be collected, are tenable, and that the judgment of the District Court should be in all respects affirmed.

J. H. COBB,
Chief Counsel for the Territory of Alaska.